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C O N F I D E N T I A L SECTION 01 OF 03 THE HAGUE 001599

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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY

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SUBJECT: ICTY: PREVIEW OF JUNE 29 MERON PRESENTATION TO  
SECURITY COUNCIL

REF: THE HAGUE 1592

Classified By: Legal Counselor Clifton M. Johnson per 1.5(d).

1. (C) Summary. In his June 29, 2004 address to the Security Council, the President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Judge Theodor Meron, will focus on the two competing sides of the completion strategy: on the one, the Tribunal's heavy workload and his initiatives to work toward completion; on the other, the impending hurdles to meeting the strategy's targets. Meron, like Del Ponte (see reftel), will argue that unless some of the hurdles to implementation are removed, meeting the 2008 deadline for the completion of all trials will be difficult, if not impossible. The readiness of the Sarajevo war crimes chamber is among the foremost variables on his mind, and following on his recent visits to Sarajevo with OHR, he will emphasize its importance to the completion strategy. Further, like Del Ponte, he will stress the seriousness of the Tribunal's budget and staffing concerns. End Summary.

2. (C) President Theodor Meron will speak on June 29 immediately prior to Chief Prosecutor Carla del Ponte presentation (a preview of which was reported reftel). According to Meron and his chief of staff, Larry Johnson, the address will not differ substantially from his May written report to the Security Council. Meron will emphasize at the outset that the Tribunal is working at full capacity, holding six trials simultaneously. But while Meron's presentation will demonstrate the commitment of the Tribunal, at all levels, to implementing the completion strategy, a consistent theme will be that maintaining the current level of efficiency and productivity depends on a number of key variables beyond the Tribunal's control: from regional cooperation and apprehension of fugitives to the ongoing budget crisis and the development of the Sarajevo war crimes chamber.

4. (C) Transfer of Cases to the Region: Among Meron's major efforts is his work to make viable the potential transfer of low- and medium-level indictees to competent national jurisdictions, particularly Bosnia. He is accomplishing this by a variety of mechanisms, including personally pushing for such efforts to succeed and ensuring that ICTY rules and procedures will allow for transfers to proceed smoothly. One example of the latter is the recent amendment of Rule 11 bis, which enables a chamber to transfer an ICTY case (i.e., a confirmed indictment) to another competent national jurisdiction. This month, the chambers amended Rule 11 bis to expand the scope of potential countries to which cases can be transferred, by allowing the referral to any countries having jurisdiction and willing and adequately prepared to accept such a case. Referral to Balkan states remains presumptive, but Rule 11 bis now suggests that other jurisdictions may also wish to prosecute or be asked to do so. The revised Rule 11 bis also expresses a requirement that the case be transferred only where it can be tried in "accordance with due process and international human rights norms," highlighting the importance of building effective and fair trial capacity in the region. Meron remains seriously concerned that local jurisdictions are not yet ready to try cases at international standards. In light of Del Ponte's possible push for transfers soon -- even in advance of jurisdictions being ready to receive them -- this could put Meron and her at loggerheads.

5. (C) With respect to Bosnia and Hercegovina (where Meron visited week of June 14), he will echo UNSCR 1503, which called for "the expeditious establishment" of a special chamber within the State Court (competent to receive cases from the ICTY) of lower- or intermediate-rank accused. The ICTY has been working with local authorities to establish a special chamber in Sarajevo, but the slow pace to date -- in particular the lack of appropriate detention facilities -- remains a serious concern to Meron. With respect to Croatia, Meron will point to concerns but also note the "cause for optimism" that Zagreb is heading in the right to direction. Serbia and Montenegro represents the most problematic case generally in terms of ICTY cooperation, and Meron is likely to note that the OSCE recently held that "the national judiciary lacks full capacity to conduct war crimes trials in

accordance with universally adopted standards." Still, as in Croatia, ICTY is working to increase judicial capacity, recently hosting a seminar with seven judges of the State,s "Special Court for War Crimes."

16. (C) Rule 28 Amendment: Meron is committed to ensuring that the Tribunal remain focused, as required by UNSCR 1534, on senior-level alleged perpetrators. This was the impetus for his amendment of Rule 28. Yet, as noted reftel, Del Ponte has criticized as an interference with her independence the amended Rule 28, which provides for the chambers to verify that a proposed indictee is a senior-level person consistent with the UNSCRs 1503 and 1534. Meron is likely to argue that it represents a modest judicial role in certifying indictments, necessary to implement UNSCR 1534, and that it has already proven to operate efficiently. His raising of the issue makes it possible that, despite contrary protestations, Del Ponte will criticize it.

16. (C) Completion strategy barriers: Meron will highlight, as his report did, some of the efforts at streamlining the appellate and interlocutory processes and the efforts to ensure that chambers are working at full capacity (six trials simultaneously). All in all, these efforts are crucial to keeping the Tribunal on pace to meet the completion strategy goals. In addition to the transfer of cases under Rule 11bis, as described above, Meron will also identify three categories of factors that could undermine his ability to implement the Completion Strategy:

-- Further Indictments and Indictees in Custody: Meron believes that the Tribunal can meet its target of completing all current trials and trials of those in custody or on provisional release by the end of 2008. Provided that key indictees are apprehended soon, so as to permit their cases to be joined to those of other accused, the Tribunal could also try some of these individuals with no more than modest slippage in the timeframe. Beyond that, however, the additional indictments and the seventeen publicly-known fugitives pose a serious problem to the Tribunal. Absent a significant number of guilty pleas and the establishment of domestic courts that can receive and fairly try a number of these cases, Meron will note the difficulties of achieving the 2008 target with such a caseload.

-- Budget: Meron will say that continuation of the current budget crisis could prove "disastrous" for the Tribunal. Combined with steady attrition of experienced members of the Chambers (leaving due to insecure contracts or inability to renew contracts), the current hiring freeze has created a shortfall of adequate personnel.

-- Judge turnover: Meron keeps a careful watch on the possible disruption of ongoing proceedings because of the non-election of some judges at the expiry of terms in November 2005. He warns that if judges are not reelected, significant time will be lost due to the need to familiarize new jurists with cases and some cases would need to be restarted from scratch. UNSYG Annan has, however, agreed with his proposal to move elections up to November 2004, providing greater lead time to deal with case assignment issues caused by changes in the judge,s rooster.

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18. (C) Meron,s report and oral submission provide a detailed and accurate perspective on the work of the Tribunal. His initiatives, priorities, and concerns track closely with USG thinking. His statement will also be largely in line with that made by the Chief Prosecutor. They are both in agreement in terms of the challenges that could jeopardize the ability of the Tribunal to meet completion targets and both skeptical about meeting the 2008 date. Responsibility for such challenges, however, is another matter, with Del Ponte believing that her completion strategy job is largely finished when the 2004 investigation target passes. The most significant difference between the two presentations will revolve around the propriety/timing of transferring cases to local jurisdictions -- a process which the OTP appears ready to commence even in advance of domestic court systems that are up to the task to receive the cases. Del Ponte,s hope, our contacts tell us, is that by proposing a large number of cases to be transferred, she can wash her hands of the issue and leave the burden (and blame) on others (i.e. the trial chambers that could not approve such transfers absent ready courts, the countries in the region that lack the courts, and the international community for failing to ensure their readiness) for failing to make the transfers proceed. Meron believes that such an approach is irresponsible (and could potentially leave detainees in a legal limbo that might violate international norms), and that the ICTY,s energy should continue to be focused on helping bring about the changes on the ground that are needed in the Balkans before such transfers can begin. The issues identified reftel for

consideration in a USG response to Del Ponte,s presentation  
will be just as relevant for responding to Meron,s  
presentation. End comment.  
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